IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3553 OF 2005

The State of Maharashtra ...Applicant

Vs.

Jayprakash @ Jayesh Jagannath Mhatre ...Respondent

Shri. S.R. Borulkar, Public Prosecutor with Sangeeta Shinde A.P.P. for the Applicant.

Shri. S.V. Gavand for the Respondent.

CORAM : A. S. OKA, J.
DATED : JUNE 30, 2005.

P.C.:

1. Heard Counsel appearing for the parties. This Application under Section 482 of the Code of Criminal Procedure, 1973 is filed by the State Government. The Respondent is the Accused. On complaint filed by one Ganesh Nagesh Thakur regarding murder of his son Prasad Ganesh Thakur, an offence was registered under section 302 of the Indian Penal Code. The Respondent who is the Accused No.2 in the said case, filed Application for Anticipatory Bail in this Court which came to be rejected by order dated 26th April, 2005. While rejecting the Application for Anticipatory Bail, this court granted time to the Respondent to surrender up to 3rd May, 2005. On 3rd May, 2005 the Rspondent

surrendered before the learned Chief Judicial Magistrate, Raigad at Alibag. The Applicant-State presented an application for remand and prayed for police custody for purposes of carrying out further investigation. The learned Chief Judicial Magistrate passed order on the same date rejecting the prayer for police custody remand and directed that the Respondent may be taken in magesterial custody till 17th May, 2005. A Revision Application was filed by the Applicant-State before the learned Sessions Judge which came to be rejected by order dated 10th May, 2005. The challenge in this Application is to the said Orders passed by the learned Chief Judicial Magistrate and the learned Sessions Judge.

2. Shri. Borulkar, learned Public Prosecutor criticised the order passed by the learned Chief Judicial Magistrate. He submitted that as a matter of course when investigation related to serious offence under section 302 of the Indian Penal Code, police custody remand ought to have been granted. He submitted that merely because the Applicant marked his presence before the Investigating Officer on few days in compliance with the condition imposed by this Court while granting ad-interim Anticipatory Bail, that is no ground to deny the police custody of the Respondent

for the investigation. He submitted that the learned Sessions Judge ought to have interfered in revision. He submitted that the learned Sessions Judge committed serious error by holding that no material was placed before the learned Chief Judicial Magistrate for grant of police custody and no ground for justifying custodial interrogation was made out. Shri. Borulkar has placed reliance on the decision of the Apex Court reported in **1994 Criminal Law Journal 2121(Supreme Court)in the case of Kosanapu Ramreddy Vs. State of Andhra Pradesh and others.** He also invited my attention to the assertion made by the police in the remand application and submitted that necessary material warranting custodial interrogation was placed on record.

3. The learned Counsel appearing for the Respondent has placed reliance on certain decisions of the Apex Court the reference to which will be made at later stage. He submitted that after completion of initial period of 15 days since the date of arrest, prayer for grant of police custody cannot be considered at this stage. He submitted that in view of findings recorded by the Courts below, no interference is called for.

4. In my view, there is some substance in the

submission made by Shri. Borulkar that in normal course when the offence alleged is under section 302 of the Indian Penal Code, the police custody remand should not have been denied on the basis of attendance by the accused in compliance with the condition imposed while granting ad-interim relief by this Court in an Application for Anticipatory Bail. The Applicant attended before the Investigating Officer and had marked his presence. The Remand Application which was filed contains necessary assertions regarding the requirement and necessity of custodial interrogation. The learned Sessions Judge has not dealt with the averments made in the Application. All that the learned Sessions Judge has stated is that necessary material was not placed before the learned Magistrate for making out the ground for custodial interrogation.

5. At this stage, it will be necessary to refer to the decision of the Apex Court reported in **(1992)3 Supreme Court Cases 141 in Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni.** In paragraph No.2 of the decision of the Apex Court, it is stated that the question that arose for consideration was whether a person arrested and produced before the nearest

Magistrate as required under Section 167(1) Code of Criminal Procedure, 1973(hereinafter referred to as the said Code) can still be remanded to police custody after the expiry of the initial period of 15 days. The Apex Court observed that it was necessary to consider the issue elaborately as there was no judgment of the said court on this point. In the facts of the case before the Apex Court, the Accused was arrested on 4th October, 1991 and was produced before Magistrate on 5th October, 1991. On the request made by the Investigating Agency, the Accused was remanded to Judicial Custody till 11th October, 1991. On 11th October, 1991 an Application was made by the Investigating Agency seeking police custody of the Accused. The said Application was allowed. While the Accused was being taken to the custody, on the way he pretended to be indisposed and therefore, he was taken to the Hospital. He remained confined in the hospital up to October 21, 1991. From October 21, 1991 the Accused was remanded to judicial custody. In view of these events, the Investigating Agency could not take the Accused in the Police Custody and an Application was made to the learned Magistrate for the Police Custody. The learned Magistrate relying on decision of the Delhi High Court in **State (Delhi Admn.) V. Dharam Pal** reported in 1982 Criminal Law

Journal P.1103 refused the police remand. Revision Application filed by the Investigating Agency before the Delhi High Court did not succeed. However, Delhi High Court did not decide the question which was noted by the Apex Court as the question arising for its consideration. Order passed by the Delhi High Court was challenged before the Apex Court. After considering the submissions made by the parties in paragraph No.8, the Apex Court held thus:

"8. Having regard to the words "in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole" occurring in sub-section (2) of Section 167 **now the question is whether it can be construed that the police custody, if any, should be within this period of first fifteen days and not later or alternatively in a case if such remand had not been obtained or the number of days of police custody in the first fifteen days are less whether the police can ask subsequently for police custody for full period of fifteen days not availed earlier or for the remaining days during the rest of the periods of ninety days or sixty days covered by the proviso.** The decisions mentioned above do not deal with this question precisely except the judgment of the Delhi High Court in Dharam Pal case. **Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the periods of ninety days or sixty days and that police custody if found necessary can be ordered only during the first period of fifteen days.** To this extent the view taken in Dharam Pal Case is correct." (Emphasis supplied)

6. In paragraph No.9 the Apex Court proceeded to hold thus:

"9. Therefore on a combined reading of Sections 167(2) and (2-A) it emerges that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested accused can order detention in such custody namely police custody or judicial custody under Section 167(2) for the rest of the first fifteen days after deducting the period of detention ordered by the Executive Magistrate. The detention thereafter could only be in judicial custody. Likewise the remand under Section 309 of Criminal Procedure Code can be only to judicial custody in terms mentioned therein. This has been concluded by this Court and the language of the section also is clear. Section 309 comes into operation after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the same. (vide Natabar Parida V. State of Orissa)".

7. In paragraph No.13 the Apex Court summed up the position of law by making following observation:

"13. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate alongwith the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction . Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different

case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with proviso as discussed above. If the investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention a per the orders of the Magistrate and not from the date of arrest by the police. **Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody."**(Emphasis supplied)

8. A reference will have to be made to another decision of the Apex Court reported in **(2000)9 Supreme Court Cases 266, Budh Singh Vs. State of Punjab.** In paragraph No.5 of the said decision the Apex Court has observed thus:

"5. In the face of facts, as noticed above, the order of the learned Judicial Magistrate, dated 04.01.2000, in our opinion, did not require any interference. **The mandate of Section 167 of the Criminal Procedure Code, 1973 postulates that there cannot be any detention in police custody, after the expiry of the first 15 days, so far as an accused is concerned.** That period of 15 days had in this case admittedly expired on 04.01.2000. The impugned order of the High Court violates the statutory provisions contained in Section 167 Cr.P.C. since it authorises police remand for a period of seven days after the expiry of the first fifteen days' period. In CBI V. Anupam J. Kulkarni this Court considered the ambit and scope of Section 167 Cr.P.C. and held that there cannot be any detention in police custody after the expiry of first 15 days even in a case where some more offences, either serious or otherwise committed by an accused in the same transaction come to light at a later stage. The Bench, however, clarified that the bar did not

apply if the same arrested accused was involved in some other or different case arising out of a different transaction, in which event the period of remand needs to be considered in respect to each of such cases. The impugned order of the High Court, under the circumstances, cannot be sustained. The direction to grant police remand for a period of seven days by the High Court is, accordingly, set aside. The appeal, therefore, succeeds and is allowed to the extent indicated above."(Emphasis supplied)

9. A reliance is placed by Shri. Borulkar on the decision of the Apex Court in case of Kosanapu Ramreddy Vs. State of Andhra Pradesh (Supra). He placed reliance on what has been held by the Apex Court in paragraph No.4 which reads thus:

"4. We have considered the submissions of learned Counsel on both sides. That a person held in judicial custody could, if circumstances justify, be transferred to police custody or vice-versa within a period of 15 days referred to in S.167(2) of the Criminal Procedure Code, 1973- which by virtue of S.20 of the Terrorists and Disruptive Activities(Prevention) Act, 1987, is to be read as 60 days in this case- cannot be disputed. There must, of course, be sufficient grounds for such a change of custody. In the present case, having regard to the nature of offence and the stage of the investigations it cannot be said that grounds for such custody do not exist."

10. Perusal of the said judgment shows that question that fell for consideration in the case of C.B.I. Vs. Anupam Kulkarni (Supra) was not considered by the Apex Court. What has been held by the Apex Court in the case of C.B.I. Vs. Anupam Kulkarni (Supra) is that the custody after expiry of first fifteen days can

only be judicial custody during the rest of the period of ninety days or sixty days as the case may be and that police custody if found necessary can be ordered only during the first period of fifteen days. Even in the paragraph No.13 of the said decision, the Apex Court held that "after the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody." The Apex Court has categorically held that there cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage.

11. It is pertinent to note that in the case before the Apex Court, in the case of Anupam Kulkarni(Supra) the Accused was arrested on 4th October, 1991 and on 11th October, 1991, the Application by the Investigating Officer for police custody was allowed and police custody could not be availed of as the Accused pretended to be ill. When the police custody remand was sought after 24th October, 1991, the prayer was rejected by the learned Magistrate placing reliance on the decision of the Delhi High Court in the case of Dharam Pal reported in 1982 Criminal Law

Journal, 1103. In paragraph No.8 of the decision of the Apex Court, the decision in the case of Dharam Pal (Supra) has been quoted with approval.

12. In view of the law laid down by the Apex Court, it is obvious that at this stage the prayer for grant of police custody remand cannot be considered and accordingly, the Revision Application is rejected.

JUDGE